1940

A. M. Bell v. Parley P. Jones : Brief of Appellant

Utah Supreme Court

Boyd D. Fullmer; Attorney for Defendant-Appellant;

6239

IN THE SUPREME COURT OF THE STATE OF UTAH

A.M.BELL,

PLAINTIFF, RESPONDENT

vs.

PARLEY P. JONES,

DEFENDANT, APPELLANT

BRIEF OF APPELLANT

BOYD M. FULLMER

ATTORNEY FOR DEFENDANT-APPELLANT

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PRELIMINARY STATEMENT

Defendant appeals from a judgement for the plaintiff, rendered by Judge Lewis Jones in the District Court of Cache County, sitting without a jury, in an action to recover on a prommissory note executed by the defendant.

STATEMENT OF FACTS

On February 6, 1928, defendant purchased land from the plaintiff's father (14,21, 25)*. Plaintiff's father executed an

*-Reference to page in abstract of record.

escrow agreement on that date, under which the price was $3,200.00, the defendant to pay $200.00 down in cash, which he did that day (9,21,25). On the same day, plaintiff's assignor assigned the escrow to the Utah Mortgage Loan Corporation (14,15).

In December, 1930, defendant assumed a mortgages for plaintiff's assignor in the amount of $100 and $1,000 as part of the balance of the purchase price (6,9,21,25). In the same month, defendant borrowed $2,000.00 from Mr. Bodrero to pay Mr. Bell, and executed to Mr. Bodrero, a mortgage on the land for the loan (21,22,23). The abstract fails to state how much of this was paid to the plaintiff's father, but the defendant states that he got the loan to finish paying Mr. Bell (21). Defendant, in his assignment of errors, alleges that

he paid plaintiff's father $580 on this contract during the years 1928, 1929, 1930, 1931 and 1932 (30), in addition to the sums mentioned, but this point is not substantiated further in the record.

On July 20, 1934, defendant executed the note in question in the amount of $850.00 and delivered it to A. J. Bell, who is plaintiff's assignor and father (1,5, 7). Plaintiff's assignor states that he thought the note wasgiven to him after the scale down agreement was completed (25).

The scale down agreement was executed on August 13, 1934, when A.J.Bell, Mr. Bodrero, and the Utah Mortgage Loan Corporation (which was the mortgagee of the mortgages assumed by the defendant) stipulated that the defendant was indebted to them and that in consideration of

receiving cash or bonds then, they would scale down the indebtednessof defendant and accept the following sums in full satisfaction of their claims against the defendant (2,3,5,6,7,12,13,14,21,22,24, 25,26):

Louis F. Bodrero	$1,850.00
Utah Mortgage Loan	$1,100.00
Alfred J. Bell	$150.00.

Mr. Bodrero and the Utah Mortgage Loan Corporation accepted and were paid in bonds of the Federal Farm Mortgage Corporation and Mr. Bell received his payment in cash at that time (13,14,2). Mr. A.J.Bell signed a scale down and release as follows (12,13):

> "Now, therefore, the undersigned creditor of said applicant hereby agrees that it will accept the sum of $150.00 in full satisfaction of the existing obligation of $400.00 now due it from said applicant and will execute a full andunconditional release of said obligation to be made in Federal Farm Mortgage Corporation bonds."

Defendant stated that he understood that

all the loans were cancelled after the scale down and payment (22).

Later, in the years 1935, 1936, and 1937, plaintiff or his assignor induced or coerced the defendant into making payments on the note as follows (1,4,22):

March 16, 1935	$25.00
July 30, 1935	$15.00
November 12, 1935	$50.00
September 12, 1936	$50.00
November 12, 1936	$50.00
March 12, 1937	$10.00
August 12, 1937	$40.00.

The payments after 1935 were made by check payable to A. J. Bell (14), and they were collected by the plaintiff. Thereafter, defendant refused to pay, andplaintiff brought this action, claiming to be a holder in due course (3). He took the note on June 15, 1936 (3,16,17). At that time, according to plaintiff's records, he had advanced his father $215.00 (16). Plaintiff then tried to show other subsequent advancements to his father

in the amounts of $108.23 (16), $127.75 (17), $175.00 (18), $10,00 (20), $20.00 (19), $38.50 (19), to prove that he advanced this money after he received the note on the strength of the note (17). Plaintiff also testified on cross examination:

> Q: You can't produce any records of what your father paid back?
> A: No, I can't... My father andmother had accommodated me, so I turned that money to them at that time. I advanced the money to them because they needed it...(19).

Plaintiff's father testified (26):

> I don't remember what my son had done for me before he came back from Honolulu. I can't remember where or when it was that I turned the note over to him. I know immediately after he returned from Honolulu hepaid my wife's hospital bill. I could not say how soon... We, like other parents did a lot for our children, they help us back later on. I hope we are not different from other folks in that respect.

The Court found due execution and delivery of the note on July 30, 1934 (7), and that principal owing on it was $707.

63 andinterest of $167.26 (8), and awarded $85.00 attorney's fees (8).

Plaintiff was found to bean assignee of the note (8).

At the time of execution of the note, defendant was found to be indebted to plaintiff's assignor in the amount of $1,250.00, and that he took the note for $850.00 and scaled the balance of $400.00 down for $150 (8). The court found that the note was the balance due on the land sold (8,9,11,12).

The court found that the $850.00 was not compromised and that the plaintiff's assignor never agreed that he was owed no more than $400.00 (5,7,9,10,22,25,29, 31). The payments were found to have been made voluntarily and the note was voluntarily executed and for a valuable consideration (10).

Thereupon, the Court gave judgement to

the plaintiff for $959.89.

THE QUESTIONS PRESENTED

WERE THE ADVANCEMENTS TO THE FATHER MADE WITH A BONA FIDE EXPECTATION OF REPAYMENT AND DID THE FATHER EXPECT TO REPAY-THEM SO THAT THEY MAY BE CLASSED AS ANTECEDENT DEBTS AND THEREFORE SUFFICIENT VALUE TO CONSTITUTE PLAINTIFF A HOLDER IN DUE COURSE?

WAS THE ADVANCEMENT BEFORE DELIVERY OF THE NOTE SO SMALL AS TO IMPUTE THAT THE PLAINTIFF TOOK IN BAD FAITH, OR NOT IN GOOD FAITH?

IF DEFENDANT HAD PAID THE WHOLE $2,000.00 TO MR. BELL, THEN AT MOST UNDER A 5% RATE OFINTEREST, HE WOULD HAVE ONLY OWED BELL $355.00, OR AT 4%, ONLY $240.00.

ON THESE FACTS, COULD THERE BE ANY CONSIDERATION FOR THE NOTE?

DID THE SCALE DOWN AGREEMENT GIVE THE PLAINTIFF'S ASSIGNOR A COMPLETE ACCORD

AND SATISFACTION OF ALL OF THE DEBTS OWED HIM BY THE DEFENDANT?

IS THE PLAINTIFF'S ASSIGNOR ESTOPPED TO ASSERT THE VALIDITY OF THE NOTE, INASMUCH AS HE STOOD BY AND REPRESENTED THAT ONLY $400.00 WAS OWEDTO HIM, KNOWING THAT THE DEFENDANT WOULD NOT HAVE MADE THE LOAN IF HE COULD NOT COMPROMISE ALL OF HIS DEBT, ANDTHEN COMPROMISED FOR A FULL SATISFACTION OF HISCLAIM FOR $150.00?

IS THE NOTE VOID OR UNENFORCEABLE AS AGAINST PUBLIC POLICY IN THAT IT TENDED TO OR ACTUALLY THWARTED THE PURPOSE OF THE FEDERAL FARM MORTGAGE LOAN CORPORATION STATUTE?

CAN PLAINTIFF, BY SHOWING THAT HE TOOK THE NOTE WITH A PART PAYMENT TO THE ASSIGNOR, CONTEMPLATING PAYING MORE LATER, BE A HOLDERIN DUE COURSE FOR MORE THAN HE PAID WHEN HE RECEIVED NOTICE OF THE

DEFECT IN THE INSTRUMENT?

STATEMENT OFPOINTS

PLAINTIFF ISNOT A HOLDER IN DUE COURSE BECAUSE HE DID NOT PAY VALUE and, (1) HE DIDNOT TAKE IN GOOD FAITH. (2) THEREFORE THE PERSONAL DEFENSES OF THE MAKER ARE GOOD AGAINST THE PLAINTIFF.

(1) THERE WAS NO CONSIDERATION FOR THE NOTE.

(2) THE MAKER AND PLAINTIFF'S ASSIGNOR HAD A COMPLETE ACCORD AND SATISFACTION.

(3) PLAINTIFF'S ASSIGNOR IS ESTOPPED TO ASSERT THE VALIDITY OF THE NOTE.

(4) THE NOTE IS UNENFORCEABLE BECAUSE IT IS AGAINST PUBLIC POLICY.

IF PLAINTIFFIS A HOLDER IN DUE COURSE, HE CAN ONLY RECOVER TO THE EXTENT OF THE VALUE WHICH HE HASPAID, WHEN HE RECEIVED NOTICE OF AN INFIRMITY IN THE NOTE, ANDHE HAS NOT PAID THE FULL AMOUNT WHICH HE HAS AGREED TO PAY.

LEGAL ARGUEMENT

PLAINTIFFIS NOT AHOLDER IN DUE COURSE BECAUSE HE DID NOT PAY VALUE.

Title 44-1-53 UCA (1953) provides:

> A holder in due course is a holder who has taken theinstrument under the following conditions:
> (1) That it is complete and regular on its face.
> (2) That he became the holder of it before it was overdue and without notice that it had been previously dishonored, if such was the fact.
> (3) That he took it in good faith and for value.
> (4) That at thetime it was negotiated to him hehad no notice of an infirmity in the instrument or defect in the title of the person negotiating it.

Qualifications 1,and 2 are not in issue. Plaintiffhas shown that he took thenote on the strength of advances which he had made to his father. Most, if not all of these advances took the form of actually paying a debt of his father to a third party for the father of the mother. The testimony of the plaintiff

is that "My father and mother had accom-odated me, so I turned that money to them at that time. I advanced the money to them because they needed it..." The test-imony of the father is that "We, like other parents did a lot for our children, they help us back later on. I hope we are not different from other folks in that respect."

It is an elementary proposition of law that for a recoverable debt, in law, to occur on the strength of one paying money for another, there must be an expectation of repayment, and an expectation or a promise from the latter party that he will repay the person so paying his in-debtedness. In this case, there isno testimony to the effect that there was any expectation to repay. The testimony clearly infers that there was no promise to repay the payments, and that there was

no expectation to repay shown at all. The authorities generally support the proposition that a subsequent promise to repay the one who hasmade a payment for the promisor is not the same as an original request to pay,the debt, and is therefore not a sufficient consideration to support the promise to repay. Massachusetts Mutual Life Insurance Company v. Green 185 Mass 306 1904 (70 NE 202). It is clear that one who voluntarily pays a debt for a third person and who has not been previously promised that he would be repaid, cannot recover the money paid from the debtor. In Re Babcock 171 NYS 1078 1918. To carry the point to its end, if plaintiff isonly a donee, that is, having given no consideration for the note, then he can have no more rights than his donor. Holladay v. Rich 93 Neb 491 1913 (140 NW 794).

The defense maintains that the testimony shows that there was no promise to repay, or that the payments were made voluntarily (ie: officiously) and that in either case, a subsequent promise to repay does not color the transcation with the consideration necessary to support the proposition that plaintiff has paid value for the note.

PLAINTIFF IS NOT A HOLDER IN DUE COURSE BECAUSE HE DID NOT TAKE IN GOOD FAITH.

In the case of National Bank of Republic v. Price -Ut- 1924, (234 P 231), the Utah Court held that the fact that the holder did not give full value is a circumstance bearing on the issue of the good faith of the taker. The cases are all clear that discounts of 5% and 10% and even 25% do not raise any presumption that the holder took in bad faith. But at the other extreme, the cases are also

clear that if one payes only a nominal consideration, then he can not be a holder in due course. (Sapp v Lifrano -Ariz- 1934 (36P2d 794). Here, the plaintiff has "advanced" $215.50 to his father prior to receiving the note for $850.00, upon which had been paid down to about $800.00. In short, the plaintiff, being the son of the payee, must have known the basis of the note, and that it was of value because there was land previously valued at $3,200 for which it was the purported balance due. That is, the plaintiff knew that the note was worth its face value, and the defendant had made payments upon it, still, he took the note on an initial "payment" of only one fourth its value. Defendant contends that the actual knowledge of the plaintiff of these facts coupled with the purchase at so great a discount is sufficient to negative any pretense of actual good faith in which the plaintiff claims he

took the note.

THE PERSONAL DEFENSES OF THE MAKER, PARLEY JONES ARE AVAILABLE AGAINST THE PLAINTIFF.

(1) THERE WAS NO CONSIDERATION FOR THE NOTE.

The note was purportedly given as the balance due on the land. Defendant claims that he fully paid for the land, and that he could not have owed the plaintiffs assignor over $400- Testimony of plaintiffs assignor is to the effect that he compromised $350 or $400. Defendants testimony is to the effect that he borrowed the $2,000 finish paying Mr Bell. Clearly the imputation of this is that he did pay the whole sum to Mr Bell. If this be true, then on a 4% interest basis, he would have owed Mr Bell only $240, and on a 5% basis he would have owed him

only $355. Mr. Bell compromised, according to the agreement, the existing obligation of $400 now due him from Defendant, Thereafter, he alleged that after the compromise of the $400, (the existing obligation) then he executed an $850 note. The testimony of Plaintiff's assignor is confusing. Certainly, if any sum was owing, then he compromised all of it, then there could not be any balance of $850 still owing. The only remaining balance was the $400 which was compromised in the scale down agreement, and the $850 note, being unsupported by any consideration at all, was not an obligation with which the defendant could be charged by the payee. That was more than he claimed from Defendant at all.

(2) THE MAKER OF THE NOTE AND PLAIN-

TIFF'S ASSIGNOR HAD A COMPLETE ACCORD AND SATISFACTION.

Plaintiff's Assignor was paid $150 on behalf of Defendant on the strength of this compromise that he would release him of all his indebtedness. Under UCA 1953 44-1-121:

> A negotiable instrument is discharged:
> (1) By payment in due course by or on behalf of the principal debtor.
> (4) By any other act which will discharge a simple contract for the payment of money.

Plaintiff's own complaint alleged that the note was executed and delivered on July 20, prior to the scale down agreement. The defendant maintains that it must have been included in the existing obligation if it ever existed at all as a valid debt, and was compromised and given a complete accord and satisfaction.

Clearly a compromise is recognized in

the law as a reputable, legally sufficient and socially desireable method of satisfying debts. Consideration for a compromise is the valid dispute as to the amount of the claim. That such a compromise settles a claim will not admit of dispute.

Plaintiff's assignor, in the compromise agreement represented that $400 was the existing obligation between him and the Defendant and he signed a document admitting that figure was also to be the basis of a full satisfaction of his claim. His testimony also states that he thought that the note was given to him at the end of this scale down transcation. Obviously, if he says that only $400 is owed him, and he settles that for $150, how can he say that he has any claim to any more money. That is, he can not claim $850 more owing him after he has stated that only

$400 was owed him. To do so would allow him to claim other sums.

(3) PLAINTIFF'S ASSIGNOR IS ESTOPPED TO ASSERT THE VALIDITY OF THE NOTE.

Now the plaintiff's assignor knew that the purpose of the defendant in securing the loan and the scale down agreement was to consolidate his debt and so to pay one creditor. Yet the plaintiff's assignor stood by andled the defendant to believe that he only claimed $400, and on this basis, the defendant thought that he had settled the whole claim. On these facts, the plaintiff's assignor is estopped to assert the validity of the noteor enforce it by reason that the defendant changedhis position to his detriment in relying upon the representations of the plaintiff's assignor. I.X.L. Stores Company v. Success Markets 98 Ut

160 1939 (97 P2d 577), where the court statedthat the vital principle is that he who, by his language or conduct, leads another to do what he wouldnot otherwise have done, shall not subject such person to loss or injury by dissapointing the expectations upon which he acted. Such a change of position is sternly forbidden. This remedy is always applied so as to promote the ends of justice. It is available only for protection and cannot be used as a weapon of assault. Defendant comesunder this doctrine in that the plaintiff's assignor failed to deny the validity of the note, and he failed to statethat he recognized it as a binding debt. He impliedly stated that the defendant was only indebted to him in the amount of $400. Therefore the plaintiff's assignor should be in all equity and justice and

is estopped to assert the validity of the note.

(4) THE NOTE IS UNENFORCEABLE BECAUSE IT CONTRAVENES PUBLIC POLICY.

The purpose of the Federal Farm Mortgage Loan Corporation was to consolidate the financial position of the farmer by placing his indebtedness under one loan, secured by a mortgage on his land. The creditors would be calledin as in this case and they would declare the amount that the debtor owed them. The Federal Farm Mortgage Loan Corporation would then endeavor to have the parties scale down their indebtedness. If indebtedness was purposefully or accidentally left out, then that would defeat the purpose of the transaction in that it would leave the debtor farmer with more obligations falling currently due than he could meet. That is, he would have too high a periodic payment, because

because the loan corporation would have the debtor paying as high as possible to repay the loan. That is, then the indebtedness which was left out of the agreement would tend to defeat the purpose or public policy of the statute. Witness Watkins from the Federal Land Bank stated that if a man scaled down, it settled the obligation. Then there could also be no additional obligation because none was declared. It would also work a hardship, which was not contracted for, on the other creditors in that they agreed that each would scale down a certain amount, considering the amount that he was owed. But if there were some undeclared debt, then to enforce paying that would be in the nature of giving a preference to that particular creditor. The creditors never anticipated doing this, in light of their agreement in the scale down. ("the condition that the applicants

total indebtedness, both secured and unsecured shall not exceed a certain stated amount"). That is, they each signedin consideration that all would scale down their total indebtedness, no less, and forever discharge the debtor of liability. That courts do deny enforcement of notes against public policy, in the case of Manson v. Harris 51 Ut 396 1918 (170 P 970), the court allowed a defense of being against public policy on a note which had been given as a "commission" to a publicofficer who claimedthe commission for getting the maker a public contract.

IF THE PLAINTIFF IS AHOLDER IN DUE COURSE, HE CAN ONLY RECOVER TO THE EXTENT TO WHICH HE HASPAID VALUE, IF HE HASPAIDLESS THAN HE HAS AGREED TO PAY FOR THE NOTE, WHEN HE RECEIVES NOTICE OF INFIRMITIES.

The plaintiff, at the time he received

the note, had advanced money to his parents in the sum of $215.50. Later, he claimed that he paid $323.00 for the note. He also stated and attempted to prove that he advanced other sums at later dates. Plaintiffhas indicated therefore that he hasmore to pay for the note.

UCA 1953 44-1-55 provides: WHen the transferee receives notice of any infirmity in the instrument or defect in the title of the person negotiating the same before he haspaid the full amount agreed to be paid therefor, he will be deemed a holder in due course only to the extent of the amount theretofore paid by him.

Plaintiff tried to prove sums subsequent to the receipt of the note in amounts over $400. That is, up to the time that he did not know the note was bad, he proved that he had advanced $215.50, or at most $323.00, yet still infering that he was paying more all of the time by attempting to show that he advanced moneys at later dates. In the case of **Felt** v Bush 41 Ut 462 1912 (126 P 688), the

court states that"all that section was intended to accomplish was to limit the indorsees' recovery to the amount he had advanced before obtaining notice of some infirmity in the paper."
That is, he is still a holder in due course, but he can recover no more than he paid for the note. The maker is protected to the extent that the holder is not harmed, and the holder will be protected to the extent that he paid value.

If entitled to recover at all, the plaintiff is limited to the figure of $215.50, against which the defendant has a set off of payment in the amount of $240.00 as admitted by plaintiff.

CONCLUSION

The plaintiff is not a holder in due course because he has given no value and he did not take in good faith. Therefore the personal defenses of the

maker are good as against him, and the defenses of accord and satisfaction, failure of consideration, estoppel to assert validity of the note andthe defense of unenforceability as against public policy make out a perfect defense of non liability on the note. Therefore the appellant-defendant requests the court to reverse the judgement of the trial court and to dismiss the complaint of the plaintiff with costs, and to give judgement for appellant on his counterclaim: $240 with interest. In the alternative, if the court finds the plaintiff a holder in due course, under the alternative defense, defendant appellant requests the court reverse the judgement of the court below in so far as it granted more than $215.50, and to allow the defendant-appellant a set off against that sum in tha amount of $240.00, and that therefore that there would be no attorney's fee or costs.